No. 83-1739

In the Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL UNION NO. 1020,
UNITED BROTHERHOOD OF CARPENTERS &
JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

TOM J. MCNAUGHTON AND
DILLINGHAM CORPORATION,
Respondents.

RESPONSE OF RESPONDENT DILLINGHAM CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

The Union seeks a writ of certiorari because the Ninth Circuit has declined to apply DelCostello v. Teamsters, ____ U.S. ____, 103 S.Ct. 2281 (1983), retroactively. The Ninth Circuit held that the two-year Oregon tort statute was applicable to the

employee's suit against the Union, essentially on a theory of malpractice. Because the employee's suit was filed more than six months, but less than two years, after the Union's refusal to process his grievance, the Union argues that the six-month period adopted in DelCostello should be applied retroactively so as to bar the employee's claim.

This Court denied the petition for writ of certiorari in a virtually identical case last term. Teamsters Local Union No. 36 v. Edwards, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (March 19, 1984). The Edwards case arose in California. The Ninth Circuit decided that the three-year California statute governing liabilities created by statute was the appropriate statute to govern the

employee's claim against his union for breach of the duty of fair representation. The Ninth Circuit refused to apply the six-month period of DelCostello retroactively so as to bar Mr. Edwards' suit against his union. The union sought a writ of certiorari, and this Court denied the union's petition.

The Union in the present case quotes heavily from this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and argues that the Chevron factors favor retroactivity. However, separating the Chevron factors and microscopically analyzing each does not necessarily advance the search for the proper conclusion. As the Court of Appeals for the First Circuit recently observed in Simpson v. Director, 681 F.2d 81 (1st Cir. 1982), the three

prongs of the Chevron case are not discrete tests but instead are three perspectives on one test, "the central question of retroactivity: was reliance on a contrary rule so justified and the frustration of expectation to detrimental as to require deviation from the traditional presumption of retroactivity?" 681 F.2d at 85.

Certainly there is a strong presumption of retroactivity in the federal courts. Yet, equally certainly, this Court has recognized repeatedly that

> "where a decision of this Court could produce substantial and equitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of non-retroactivity." Chevron Oil v. Huson, supra at 106-107.

As to the suit against the Employer, we believe that the various

opinions in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), put Mr. McNaughton on constructive notice that the policy of rapid resolution of labor disputes would require application of a short limitation period. In Oregon, the choice was either twenty days (the State statute governing vacation of arbitration awards) or six months. Both could be respectably argued for based on the opinions in Mitchell. Nothing longer could be reasonably argued for after Mitchell, since the only other choice as against the Employer would have been a six-year statute, a period which had been explicitly rejected by this Court in Mitchell:

> "This system [the collective bargaining system] with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if

> a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later." 101 S.Ct. at 1563-1564.

As to the suit against the Union, however, we believe that Mr. McNaughton can make a strong case for detrimental reliance. The Ninth Circuit had previously characterized fair representation claims in California as liabilities created by statute, with a three-year limitation period. Price v. Southern Pacific Transportation Co., 586 F.2d 750 (9th Cir. 1978). Justice Stevens had, in Mitchell, expressed the view that the claim against the Union was akin to a claim of malpractice. In Oregon, malpractice claims must be brought within two years. In Auto Workers v. Hoosier Cardinal, 383 U.S.

696 (1966), and in Mitchell, the court emphasized that the usual procedure would be to look to state law for the appropriate analogy. While Justice Stewart argued for the six-month period of the National Labor Relations Act, his views raised an issue which was not actually before the court.

As the Ninth Circuit recognized in Edwards, "retroactive application of a shorter statute of limitations than that pertaining when the case was filed is inherently unfair." 719 F.2d at 1040. It would seem that Mr. McNaughton could reasonably have relied on Hoosier Cardinal, Mitchell and Price to believe that he should look to the most appropriate state statute of limitations. As to the claim against the Union, Mr. McNaughton could reasonably have concluded that

the applicable period was two years, the period which the Ninth Circuit chose. Application of DelCostello retroactively would deprive Mr. McNaughton of a remedy, even though he filed his suit only some nine months after his claim accrued.

CONCLUSION

For the foregoing reasons, respondent Dillingham Corporation believes that the decision of the Court of Appeals for the Ninth Circuit is correct and should not be disturbed.

Respectfully submitted,

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